No. 17070

In the

United States Court of Appeals

For the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon corporation,
Appellant,

vs.

HERSHEY CHOCOLATE CORPORATION,
a Delaware corporation, et al,
Appellees.

ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION ET AL

Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, JUDGE

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ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION ET AL

Appeal from the United States District Court
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HONORABLE JOHN F. KILKENNY, JUDGE

JURISDICTION

The District Court had jurisdiction under 28 USCA § 1333(1).

On May 16, 1960 the District Court entered an interlocutory decree (R 92-94). Appellant Albina Engine & Machine Works, Inc. ("Albina") appealed within the

time permitted by 28 USCA § 2107 for proceedings in admiralty (R 95).

This Court has jurisdiction under 28 USCA §§ 1292 (3) and 1294(1).

STATEMENT OF THE CASE

Introduction

Albina's statement of the case is incomplete and must be supplemented.

As against appellees Hershey Chocolate Corporation et al ("cargo"), Albina's argument proceeds as follows:

a) Albina's negligence caused the fire which extensively damaged the cargo; however,

b) The antecedent negligence of appellee Luckenbach Steamship Company, Inc. ("Luckenbach") prevented prompt extinguishment of the fire and was therefore the sole cause of some of the damage; and

c) Albina is not liable to cargo for that part of the damage (Br 42-43, 62-63, 68, 76-77).[1]

The libels filed by cargo (R 3-10) asserted claims against Luckenbach (as well as Albina) and alleged owner's design and neglect rendering the fire statute (46 USCA § 182) inapplicable. Cargo was and is still of the opinion that the fire resulted from the concurring

1. Other issues exist between Luckenbach and Albina, but Albina claims nothing for them as against cargo.

fault and negligence of Albina and Luckenbach's managing officers and agents. However, the applicability of the fire statute turned on questions of fact. The trial court found against cargo on those questions (R 80-84)[2] and held that Luckenbach was not liable by reason of the fire statute.[3] Cargo, being content with its decree for recovery of all of its losses from Albina, did not appeal from the decree in favor of Luckenbach.

Albina's Gross Negligence[4]

1. The trial court's findings.

The trial court found that

> "It is clear that Albina, in using the torch for the cutting and welding of metal in the presence of highly inflammable burlap bags, was undertaking an extremely dangerous operation. Even if Albina, by deliberate design, had attempted to create a hazardous fire condition, it could have made no improvement. The use of an acetylene torch, with its attendant heat and great danger, under these conditions, was nothing less than wanton conduct. * * *" (R 77)

---

2. That finding and, indeed, all other findings of the trial court are to be sustained on appeal unless clearly erroneous. Rule 52(a) FRCP; *McAllister v. US*, 348 US 19, 75 S Ct 6 (1954); *Marshall v. Westfal-Larsen & Co.*, 259 F2d 575 at p. 577 (CA 9 1958).

3. It found that Sterling, a managing agent of Luckenbach, was not negligent and had ordered the ship's water lines to be connected with the dock hydrant (R 81, 88). It also found that Radovich was a subordinate employee with limited duties which did not relate to the ship's repairs (R 81, 88, 89) and that there was no evidence of a lack of due diligence by anyone after the fire started (R 84).

4. The testimony relating to this subject is ignored in Albina's Statement of the Case (Br 4-17).

It also found that

> "The fire was caused solely by the gross negligence of Albina in the manner in which it attempted to do the welding. There was no welding at the after ladder, so that is eliminated. The welding at the forward ladder could have been safely done, if proper and usual precautions had been taken. There was ample space — between 2 and 4 feet between the ladder and the cargo, in which to erect a fireproof, insulating screen, or curtain; notice to the ship's officers could have been given by the welders when they came aboard that welding was about to commence, and to have water ready; a hose either from the ship (if notice had been given) or from the dock could have been led into the hold with water pressure in it; one or more fire extinguishers could have been at hand. The requirements of the Portland City Ordinance regarding welding could have been complied with. If any of these precautions had been taken, there would have been no fire. Instead, none was taken. The only thing relied on was a can of longshoremen's drinking water left in the hold, which, of course, was utterly inadequate." (R 89-90)

The record sustains these findings and Albina's resulting liability for all of the loss which resulted to cargo.[5]

2. Statement of the facts.

a. Albina's conduct prior to the fire.

When its welding crew went aboard the vessel, Albina knew that a section of the main fire line in the

5. Albina expressly concedes that the record supports a finding that its failure to take additional precautions "proximately contributed" to the fire (Br 62). It denies only that it was guilty of gross negligence or that its conduct violated applicable statutes, ordinances and regulations (Br 51-60, 62).

engine room had been removed for repairs, and that there would be no pressure in the ship's water lines unless a substitute water supply had been established. However, it took no steps to ascertain that such had been done, nor did its managing officials ascertain the nature of the cargo in the forward part of No. 5 hold after being told that the repair was to be made to the forward (not the after) ladder.

Mr. Sterling, Luckenbach's port engineer (R 313), received the repair orders from the ship's officers (R 315-316) and arranged with Mr. Bailey, Albina's superintendent in charge of repair work (R 173, 496), for removal (and repair) of the fire line (R 318) and for the new ladder rung (R 175).

Mr. Bailey received the ladder repair order from Mr. Sterling through Mr. Brewer, Albina's superintendent at Swan Island (R 175, 487, cf 326).[6] He gave instructions to Albina's day-shift foreman for Mr. Smith to do the job (R 122, 179). He was advised that cargo would be cleared from the area of the ladder by 6 p.m. and that the welding should be done between 6 and 7 p.m., while the longshoremen were having their supper break (R 122-123, 149, 177, 184, 326). Mr. Bailey and Mr. Brewer both inspected the job area with the chief mate, who told them that the work was to be done on

6. Such minor repair orders are commonly given verbally rather than in writing. This order was verbal (R 176, 181, 325-326).

the after (not the forward) ladder in No. 5 hold (R 316, 317, 327). However, the cargo of metal conduit stowed in the after part of No. 5 hold was high around the after ladder, and they could not see the area of the reported broken rung (R 178, 183, 316).

Later that day, Mr. Radovich reported to Mr. Brewer that the broken rung was on the forward (not the after) ladder (R 184, 503). Nothing was then said about removing cargo from the area of the forward ladder (R 503). Mr. Brewer transmitted this information to Mr. Bailey at about 4 p.m. (R 184, 510), before the repairs were attempted (R 503). Mr. Bailey, however, made no inquiry respecting the nature of the cargo stowed in the area of the forward ladder (R 184).

Earlier the same day, Albina removed a section of the main fire line in the engine room for repairs, thereby rendering the ship's water lines inoperative in the absence of a substitute supply (R 186, 279-281, 315-316, 327).[7] The line was to be replaced the following day (R 327-328).

The pipefitters who removed the fire line, as well as the welding crew, were under the direction of Mr.

7. The fresh water tanks (which were attached to the shore hydrant during the afternoon (R 290-291)) could not be connected for fire protection (R 291-292). However, the ship had a CO2 system in the holds (R 283-284). Albina apparently knew nothing of this when it commenced welding. Mr. Sterling testified that the port side line was still operative up through the midship house (R 321-323). However, that line did not supply water to the holds (R 446-447; cf Br 11).

Bailey, who actually saw the fire line removed (R 510-511). He knew that removal of the fire line disabled the ship's water system unless an alternative supply should be arranged (R 517-518); however, he made no investigation to see if an alternative supply of water had in fact been established (R 187, 188, 518).

He knew that the chief engineer, Mr. Hebert (R 276), had requested that this be done (R 187-188). Mr. Hebert, on the other hand, relied on Albina to make the connection (R 280-281). He "was certain" that the connection had been made and did not check the fact (R 287). Mr. Hebert had told Mr. Sterling that he would take care of the connection (R 321, 323, 488-489). The ship's captain testified that responsibility for hooking up the shorelines rested upon *both* the contractor *and* the ship (R 210-211).

Albina had previously ceased the practice of notifying the captain of the port prior to commencing welding jobs and did not do so in this case (R 185). Luckenbach, on the other hand, always relied on the contractor to give notice of welding to the port captain (R 320-321).

b. Conduct of the welding crew.

This was a "hurry-up" job which had to be completed before the longshoremen returned from their dinner-break (R 149). Albina's three-man welding

crew, with Lester L. Smith in charge (R 118), went aboard to install the ladder rung in No. 5 hold at about 6 p.m., after the longshoremen had stopped work (R 118, 123). None of Albina's employees spoke with any of the crew members or told them of the prospective welding operation prior to the fire (R 119 (Smith); R 146 (Riley); R 168 (Larson); R 180 (Bailey)).[8]

The welding crew had with them a dolly carrying the welding equipment (R 539-540), but brought no fire fighting equipment of any kind (R 540). The welder (Mr. Larson) was instructed to string the welding lead down into No. 5 hold (R 119), which he did (R 121, 146, 147, 159-160).

Mr. Smith, the foreman, was first in the hold (R 147, 161). He found cargo at the forward end of the hatch within two or three feet of the ladder (R 120, 221). The cargo, which was then observed by the welding crew to consist of paper and burlap (R 125-126, 169, 523, 550, 572; see also R 223), ran clear across the width of the ship (R 120, 221, 147-148), and there was an area of ten or twelve feet "between the two bunches of cargo" (R 120, 126).[9] The broken ladder rung was four or five feet above the landing pad which covered the floor of the hold (R 124, 168).

8. It is stipulated (R 53) that the welders determined that it was the forward ladder which required repairs and that they proceeded to work "without further instructions."

9. See also stipulated facts (R 53).

Mr. Smith, prior to the arrival of Larson and Riley (R 148), built a partition four or five feet high (R 132, 558, 584) from some pieces of plywood and cardboard which he found lying on the floor of the hold (R 124-125, 131, 141, 162, 532-533). He leaned the pieces against the cargo (R 125) and placed a one-inch board along the bottom (R 125, 131, 142, 162, 544). This board "was supposed to be tight against the deck" (R 131). He thought this would be sufficient precaution against fire (R 130-131).

The only other precaution of any kind taken against fire was to have present a three to five gallon can of drinking water which Mr. Smith found in the after end of the hatch, one probably used by the longshoremen (R 129, 147, 161, 540-541, 578).

Mr. Smith did not ascertain prior to commencing welding whether there was any pressure in the ship's water lines (R 133, 532). He had not been told that the main line was severed (R 527).

Mr. Riley or Mr. Smith told the welder, Mr. Larson (R 158, 163, 570), to strike an arc and melt a gob of weld off the old weld on the ladder (R 125, 149, 163-164, 553). When he first struck an arc, sparks immediately fell to the deck and rolled toward and under the plywood shield and into the cargo (R 125, 132, 149-150, 171, 524, 545, 549-550, 553).

"* * * He struck the arc and of course, the sparks fell down on the deck and it bounced underneath the bulkhead or they rolled underneath, and we couldn't get at it to get it out." (R 149)

Mr. Smith immediately told him to stop (R 125, 553, 572). He pulled the plywood back and saw flames (R 125, 132). Mr. Smith threw the can of water on the flames, but

"* * * it just took off in between the bales, to where I couldn't get the water to it by pouring it on. * * *" (R 125; see R 143, 164, 524, 553, 573-574)

"Q. Now, Mr. Smith, you said that when you pulled the plywood back, you found flames?

A. Yes, that's right.

Q. This was instantaneous?

A. Yes, sir.

Q. Now, were these flames advanced or did they appear to be small and spread rapidly?

A. It spread rapidly—I mean, it wasn't a big blaze, but she was back in between the bales. I mean, the spark caught on fire and just seemed to spread back in between the bales."[10] (R 128)

---

10. Mr. Smith testified at the trial that the sparks ignited

"* * * the lint on one of these bales. They had some burlap bales down next to the deck, and when it hit this lint it just flash-fired, and she carried through to where I couldn't get it. * * *" (R 524; see also R 548)

He also testified:

"* * * sure, it was a serious fire, * * *" (R 525)

Mr. Riley testified at the trial that he saw smoke, but no flames (R 553, 554, 556, 559). This was contrary to his testimony at the Coast Guard hearing (R 559).

The fire spread very quickly.

"Q. Oh, you mean you climbed up on deck to get a fire hose just because the spark went under the bulkhead?

A. Oh, no sir, it was starting to go. I mean, there is no stopping that piece of hemp once it starts burning.

Q. It started to flame instantly, did it?

A. Yes, sir." (R 150)

"Q. Did the flames seem to move rapidly—did you observe it to move?

A. Yes.

Q. It did?

A. Yes." (R 164)

"Q. Was it this particular cargo [of burlap and paper] that seemed to flare up rapidly—where the flames spread rapidly?

A. Yes.

Q. It was?

A. Yes." (R 169; see also R 170)

"Q. Did I understand you to say there was a flash fire at once?

A. When I looked at it, yes, it traveled—I don't say like gasoline would go—

Q. Over what extent?

A. Well, it was back in there eight or ten feet in the bales.

Q. It just flashed back?

A. Yes." (R 543)

The witness poured water on the fire but

"Q. * * * The fire had got beyond that area, had it?

A. That is right. It was back in between the bales. There was other cargo on top of it." (R 543)

Since the water in the drinking can was insufficient to put out the fire, Mr. Smith told Mr. Riley to bring down a deck hose (R 150, 525). There was testimony that this took about two minutes to do (R 528, 555). However, despite three requests by Mr. Smith that water be pumped into the line, there was no pressure in the main—and no water (R 133-135, 151, 526-527, 554-555). Mr. Smith testified at the trial that the fire was then located in the forward part of the hold (R 529).

Mr. Larson stayed in the hold until it was so smoky that he had to leave (R 137, 574-575).[11] He came on

11. For some time after the fire began, and even while it was flaming and smoke was billowing from the hold, Mr. Larson was still denying to men on deck that there was any fire or anything burning except the welding torch (R 275, 353-354).

deck before (or just as) the fire trucks arrived (R 154, 165, 575). He left the hose in the hold (R 154). The welding crew made no further effort to fight the fire until the fire department came (R 137, 151-152, 155, 166), except to break the lead to the welding machine (R 139, 166).

c. Customary and necessary safety practices ignored by Albina.

Mr. Sterling testified, and his testimony was not contradicted, that it is the contractor's responsibility to take necessary fire precautions during welding operations:

> "Q. Now, referring to item number 4, which is the repair of the ladder rung, what arrangements, if any, were made by you relative to any fire protection during the welding?
>
> A. *Well, we don't make any.* The yard, when they go up, they generally have a man—they bring three men along and one of them is generally a foreman and then they have a man as a fire watch and then they have a welder.
>
> Q. I see.
>
> A. *They are supposed to have the equipment.*
>
> Q. Now, with respect to the fire watch and equipment—to what do you refer? Would you consider, for example, a drinking bucket of water near at hand sufficient (interrupted)—
>
> A. *No; they should have one of these little spray pumps like they used to have during the war* for (interrupted)—

Q. You mean a water spray?

A. Yes; water spray.

Q. Has it been generally—the practice as you have observed it for such a pump to be furnished by the welders?

A. Oh, yes; the yard—the yard—they used to have lots of them. Sometimes they bring a CO2 along. *That's up to the yard, whatever they want to send along with their fire watch.*" (R 324-325; emphasis supplied)

Mr. Riley testified at the Coast Guard hearing of the customary safety practices which are necessary in such operations.

"Q. * * * is there any form of general practice that you conform to for safety's sake, when you have to weld in cargo holds?

A. Well, we usually have a fire extinguisher or water in the holds.

Q. Like you did in this instance—(interrupted).

A. Yes, sir.

Q. —a bucket? But is it a practice say for you to insist upon the ship's force rigging a fire hose in advance and having pressure to the nozzle?

A. No, sir.

Q. Pressure to the hydrant?

A. Not to my knowledge it isn't.

Q. There weren't any hand extinguishers nearby at hand, were there?

A. No, sir.

Q. Have you ever been given any specific instructions by your employers relative to what you will do and what you will not do with regard to safety against fire?

A. Well, they ask us to have a fire extinguisher; that's about all.

Q. They ask you to have a fire extinguisher?

A. Yes, sir.

Q. Or did they direct that you shall have a fire extinguisher?

A. Well, we should have one, yes.

Q. Then this bucket, I take it, in this particular instance, was to be a substitute for the fire extinguisher?

A. Yes, sir.

Q. Are there—did you get those instructions with regards to having a fire extinguisher verbally or is there something in writing that you know of?

A. Not that I know of.

Q. I see—strictly verbal instructions furnished all welders?

A. Well, it is for everybody working on the waterfront, yes."[12] (R 156-157)

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12. Mr. Riley's testimony at the subsequent trial contradicted this plain statement of fact and was thoroughly impeached (R 560-566). His clumsy efforts to extricate himself from the resulting contradictions succeeded only in emphasizing his earlier testimony. See also libelants' Ex 7B. His testimony at the Coast Guard hearing

> ". . . made while the circumstances were vivid in the memory of the witness, at a time when no litigation was pending . . . [is] entitled to great weight. . . ."
> *(Meyer v. T. J. McCarthy SS Company (etc.),* 1960 AMC 877 at p. 881 (DC ND Ohio 1960))

It was stipulated that the testimony given at the Coast Guard hearing might be offered by any party and received in evidence (R 56).

Mr. Larson also testified positively to the precautions prescribed by Albina for welding in the holds of vessels.

"Q. What normally is your practice?

A. Well, we usually use water or anything that we can—that we can—make it as safe as we possibly can.

Q. You mean keeping water on hand for an emergency?

A. Yes.

Q. Are there any instructions that you have ever been issued by your company with respect to maintaining any fire prevention equipment on hand?

A. Yes, there has been; yes.

Q. What, specifically have you been instructed to do?

A. *Either pull out—put out—pull out a fire line or use a CO2 bottle, or something like that.*

Q. In other words, to keep some fire-fighting apparatus on hand in readiness, is that it?

A. Yes, that's right.

Q. Are these written instructions or are they verbal?

A. Verbal instructions.

Q. Verbal instructions. Do you have anything in writing at all?

A. No; no." (R 170-171; emphasis supplied)

None of these minimum and customary safety precautions was observed by Albina on this occasion.

d. Additional circumstances of negligence.

1) As shown above (supra, p. 6), Albina knew that a section of the main fire line had been removed. In fact, it had performed the removal itself. However, it proceeded with welding operations without ascertaining if a substitute water supply had been established.

2) The welding crew should have anticipated the danger of sparks resulting from this work.

> "The Witness: That is not an unusual thing, for sparks to fall like that in that type of welding, your Honor, no.
>
> The Court: It is a rather common thing, is it not?
>
> A. Well, yes.
>
> The Court: That is all." (R 545)

3) The cargo, the nature and location of which was observed by the welding crew, was extremely close to the point of operations.

> "The Court: Then how far away was it started? Would you say it started from directly underneath the rung?
>
> A. Probably two feet, something like that, or two and a half feet. There was cargo directly behind.
>
> The Court: Then when you put these cartons up there you knew there was burlap within two or two and a half feet of the particular ladder?

A. Yes. I knew the cargo was there. I don't say that I especially noticed the burlap.

The Court: You knew—

A. I knew there was sacks there; yes, sir." (R 550; see also R 560, 572)

4) Albina's supervisory employees did not ascertain the nature of the cargo about the forward ladder after being told that it was to be repaired, nor did they arrange for its removal prior to welding (R 184, 503).

OUTLINE OF ARGUMENT

1. Albina's gross negligence caused the fire.

2. Albina was liable to cargo for all resulting damage, whether or not Luckenbach should also have been held liable for all or a part of such damage.

3. Albina violated applicable ordinances, statutes and regulations which were binding upon it.

4. The trial court did not err in adopting its opinion as findings of fact and conclusions of law.

ARGUMENT

1. Albina's gross negligence caused the fire.

Albina was grossly negligent in the following particulars:

a) It conducted welding operations within two or three feet of highly dangerous and inflammable cargo, and it did so without an adequate supply of water and without ascertaining whether an adequate water supply was available (Specification 2, R 59).

b) It did not erect a suitable or sufficient barricade between the welding area and the cargo (Specification 7, R 59). The very first time an arc was struck, sparks rolled beneath it and ignited the cargo.

c) It did not have any fire extinguishers or other fire fighting apparatus of any kind at the place where the welding was being conducted (Specification 6, R 59). Customary safeguards to prevent or extinguish fires were ignored or forgotten.[13]

d) Its employees gave no notice to the ship's crew that such work was to be carried on, nor did they take any steps prior to welding to ascertain that the ship's water system was in operating condition (Specification 1, R 59). This was particularly negligent, because Albina, earlier that same day, had removed a section of the main fire line in the engine room for repairs.

e) Its superintendent did not investigate the nature or location of the cargo before ordering the welding

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13. Albina suggests that it followed customary practices (Br 62). This assertion was conclusively disproved by the testimony of Albina's own employees at the Coast Guard hearing (reviewed above, pp. 14-16) and the utter confusion of Mr. Riley when he attempted to change his story at the trial (R 560-566).

crew on the job.[14] He did so, even though Albina knew that

> "* * * there is a fire hazard in working in cargo holds." (R 183)

Albina's admission of negligence is proper (Br 62). In *Lawrence Warehouse Co. v. Defense Supplies Corp.*, 164 F2d 773 at p. 776 (CCA 9 1947) this Court held that evidence of the use of an acetylene torch in the vicinity of inflammable material without providing any fire fighting equipment except a five gallon bucket of water supported a finding of negligence.

In *US et al v. Todd Engineering Dry Dock & R. Co., Inc.*, 53 F2d 1025 (DC La 1931) it appeared that immediately prior to a fire, the defendant repair company's employees had used a blowtorch near tank tops littered with oily rags and other inflammable material. The court said that the accumulation of debris constituted a hazard and considered what precautions should have been taken.

> "It was unquestionably the duty of the repairmen *to secure full information as to the dangers presented*, and this of course required them to examine into the condition in the bilges and on the tank tops to determine whether or not they were

14. The record also demonstrates negligence with respect to other specifications set forth in the pretrial order, but these are believed to be established beyond question.

sufficiently clean. If they were not clean, they should have been cleaned and a man then given a bucket of sand or a fire extinguisher whose sole duty would be to watch the sparks and the molten metal. As a further precaution the repairmen should have placed a man with a bucket to catch the sparks, *and it undoubtedly would have been good practice to have spread a piece of wet canvas between the boilers to guard the tank tops which were openly exposed.*

Though their duty was plain, it is clear from the evidence that the respondent's servants took no precautions but proceeded to use the oxy-acetylene torch *without examining the tank tops or looking into the bilges and without employing any of the usual and customary safeguards. This failure of duty on their part constituted gross negligence.*" (at p. 1031; emphasis supplied)

See also *International Mercantile Marine SS Co. v. W. & A. Fletcher Co.*, 296 Fed 855 (CCA 2 1924), cert den 264 US 597 (1924) in which the Court said:

"* * * The only cause suggested by the evidence is the blowtorch, and *the maintenance of that probable cause in proximity to so much inflammable material was itself negligence. Liability is measured by the known dangers to be guarded against*, and if care according to the circumstances is wanting, the natural inference is that injury accrues from the known danger — it is caused by the lack of care. The blowtorch near remover and waste was negligence, the danger of fire was well known, and we find adequate cause proximately existing in that negligence for the ensuing loss. * * *" (at pp. 858-859; emphasis supplied)

See Anno: *Liability for injury or damage resulting from fire started by use of blowtorch*, 49 ALR 2d 368.

The evidence conclusively established Albina's gross negligence.

2. Albina was liable to cargo for all resulting damage, whether or not Luckenbach should also have been held liable for all or a part of such damage.

The trial judge found as a fact that there was no lack of due diligence by any person after the fire began (R 84), and that Albina's gross negligence caused the fire (R 89). This finding of proximate cause is "peculiarly within the province of the jury or other trier of fact" (*Orr v. Southern Pacific Company*, 226 F2d 841 at p. 843 (CA 9 1955)).

Albina, however, contends that the prior negligence of Luckenbach in failing to remove cargo and in failing to have an adequate water supply (Br 47-51) was the sole cause of some of the damage, which limits its liability for cargo's loss to that portion of the loss which was sustained in the initial stages of the fire.[15] This contention is wholly without merit.

a) Albina's negligence related not only to the outbreak of the fire, but, in addition, to the failure to extinguish it.

15. There is little evidence from which such an apportionment might be made, even if Albina's theory were correct. See *American Mail Line, Ltd. v. Tokyo Marine & Fire Insurance Co., Ltd.*, 270 F2d 499 at p. 502 (CA 9 1959).

Albina contends (Br 42-43) that if water had been available the "little fire" (R 573) would have been promptly extinguished, and cargo loss would have been small. It argues that since Luckenbach failed to supply the water, Luckenbach alone is responsible for most of the cargo loss. This is an incorrect statement of law, and Albina fails to cite a single case in its support. It is also an incorrect statement of the facts. It was unquestionably Albina's duty to have present the necessary equipment and to take reasonable precautions to extinguish a fire in its initial phase if one should break out (the fire fighting equipment testified to by its employees as necessary and customary on such jobs would, of course, be needed only *after* a fire should break out). It was Albina's failure to have any equipment available to extinguish a "little fire" which enabled the fire to grow and spread.

In *Lawrence Warehouse Co. v. Defense Supplies Corp.*, supra, 164 F2d 773 at p. 776 (CCA 9 1947) this Court held a welder liable because

> "* * * No precautions were taken in the way of providing fire fighting equipment with which such a fire as the torch started could have been put out. * * *"

In *Southport Transit Company v. Avondale Marine Ways, Inc.*, 234 F2d 947 (CA 5 1956), relied on by Albina, the repair yard was held, among other things, to have negligently breached its duty to extinguish the fire after it began. This was

> "* * * a duty which, by its nature, continued after the initial event. * * *" (at p. 955)

Albina's negligence caused the fire to ignite and to spread. On the facts, it is necessarily responsible for all of the resulting loss.

b) Furthermore, there was abundant evidence in the record (reviewed above, pp. 11-12) that *the fire began quickly and spread rapidly.*[16] In such case, all of the resulting cargo damage was the direct and obvious consequence of the very outbreak of the fire which unquestionably resulted from Albina's negligence. The concurring negligence of Luckenbach cannot insulate Albina from liability for all of the resulting damage.

c) This is not a case of subsequent intervening negligence which causes loss not within the scope of the defendant's negligence. Luckenbach's negligence was antecedent to the fire and at most concurred with Al-

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16. Appellant argues that it could have been extinguished with slight damage if water had been quickly available, relying solely upon the opinion testimony of its welding crew at the trial (Br 12-13). In view of the record, this is at least debatable.

bina's negligence to cause the loss.[17] However, even if it be regarded as intervening negligence, the claim that it limits Albina's liability is wholly incorrect.

Southport Transit Company v. Avondale Marine Ways, Inc., supra, 234 F2d 947 (CA 5 1956) was an action by a tug owner against a contractor whose negligence in the use of an acteylene torch caused a fire on the tug while it was undergoing repairs. The contractor's employees put some water on the fire and left. Later, the tug master saw smoke, put more water on the fire, and left. All hands then left the ship, and thereafter the fire went out of control and did extensive damage. The court held that the doctrine of contributory negligence was wholly inapplicable, because the negligence of the tug master followed the outbreak of the fire. Secondly, it held that the shipyard was liable for *all* damage caused by the fire, except such as might be shown to have been avoidable by the tug master. It said:

> "*So far as the original fire is concerned, there was, of course, no basis for imposing any or all or part of its consequences on the tug owner*. The shipyard, on the basic fact findings of the District Court * * * was and remains clearly liable for this and *all damage* proximately caused by this fire.
>
> The tug owner's action subsequent to that related not to liability *but to a possible reduction in the*

17. Albina apparently concedes that this was concurring negligence (Br 45; cf Br 66-68, where counsel discusses "intervening cause").

award to the extent that its failure to take reasonable steps augmented the loss. This was, then, a question of diminution of damages, * * *

* * * Under the teaching of the doctrine of avoidable consequence, a substantial burden is therefore heavy on the wrongdoer to establish that prudence called for action by the tug owner at one or more of these stages; and, that had it been taken, the resulting damage would have been substantially different. * * *" (at p. 954; emphasis supplied)

The doctrine of avoidable consequences, as a basis for reducing damages below their full amount, is wholly inapplicable to cargo, an entirely innocent party which had no opportunity to avoid any of the loss.

Indeed, in *Rayonier, Inc. v. US,* 225 F2d 642 (CA 9 1955) and *Arnhold v. US,* 225 F2d 650 (CA 9 1955) this Court held that *it is the presence — not the absence* — of adequate fire fighting equipment sufficient to bring the initial blaze under control which can operate as an independent intervening cause and shield the original wrongdoer from liability for damage caused by a further outbreak of the blaze. The *absence* of such facilities cannot conceivably be an intervening cause when it merely allows the blaze to spread and cause further damage.

Since at most the ship's negligence concurred with Albina's gross negligence, the destruction of the cargo

was simply the foreseeable result of concurring causes. The applicable principle is simply stated:

> "* * * Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each may be charged with all of it. * * * [E]ntire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made.
>
> * * * It is not necessary that the misconduct of two defendants be simultaneous. *One defendant may create a situation upon which the other may act later to cause the damage. One may leave combustible material, and the other set it afire;* one may leave a hole in the street, and the other drive into it. * * *" (Prosser on Torts (2d Ed 1955) 226-227; emphasis supplied)[18]

Albina is responsible for all of the normal and foreseeable consequences of its negligence. In this case, it negligently ignited and failed to extinguish a fire in the cargo. The damage to the cargo which resulted was the inevitable result of that negligence.

d) Furthermore, Albina knew that the fire line had been removed from the engine room and was therefore on notice that there might be no water pressure in the lines. As a matter of law, it was foreseeable that the substitute water supply might be lacking, and Albina

18. See also Restatement of Torts, § 450; *Inland Power & Light Co. v. Grieger*, 91 F2d 811 (CCA 9 1937).

therefore became liable for all of the cargo loss which resulted from the lack of water in the line.

In *Fredericks v. American Export Lines, Inc.*, 227 F2d 450 (CA 2 1955) it appeared that the plaintiff-longshoreman was injured by a defective skid iron manufactured by one of the defendants. Judgment against the manufacturer was affirmed. The Court said:

> "It is elementary that the concurrent negligence of some third person will not absolve a defendant upon whom liability is sought to be imposed with the consequences of his own delict. * * *
>
> * * *
>
> *That the intervening purchaser will remain passive or otherwise fail to do what he ought to do to prevent the course of events, is a reasonably foreseeable consequence of the original wrongdoing.* Moreover, this is not a distinction based upon mere passivity but rather upon *whether or not the ultimate fact or occurrence is reasonably foreseeable.* This is a far cry from the doing of something or the refraining from doing something constituting an improbable, independent, intervening cause, which is a superseding cause and breaks the sequence. * * *" (at pp. 453-454; emphasis supplied)

The same Court in *Slattery v. Marra Bros., Inc.*, 186 F2d 134 at p. 136 (CA 2 1951) said:

> "* * * The intervening wrong of a third person is no longer considered as 'breaking the causal chain,' or making the first wrong a 'remote,' and not a 'proximate,' cause for all those preceding

events, without which any later event would not happen, are 'causes'. What really matters is how far the first wrongdoer should be charged with forecasting the future results of his conduct; and the intervention of a later wrong is no different from the intervention of any other event. * * *"

In *THE GLENDOLA*, 47 F2d 206 at p. 208 (CCA 2 1931) the court considered the question whether liability extends to all injuries resulting, however improbably, from the initial negligence, or whether only foreseeable damage can be recovered. The court continued:

"In the case at bar, however, that question does not really arise, because it appears to us that, judged by either rule, the Glendola is liable for the strand and second collision. Even if we accept the narrower doctrine, and find it necessary that the later injuries must be reasonably apprehended at the outset, they were such. * * * *It did not require powers of divination to foresee that she would thus have trouble in docking, and while we agree that nobody could foretell exactly how this might arise, that was not necessary, if it was likely that it might include a strand in such narrow waters,* under which she might swing with the tide against one shore or the other. * * *

* * * there may be occasions when the intervention of another conscious agent may be so unexpected that the actor charged with the initial omission should be held no longer liable. * * * It is the probability of the occurrence of the wrong which counts, not the fact that it is a wrong; * * *" (at pp. 207-208; emphasis supplied)

See also *Hansen v. DuPont (etc.) Co., Inc.*, 33 F2d 94 (CCA 2 1929) in which a charterer had negligently stowed cargo, but the owner's agents were thereafter "extravagantly" negligent in its handling resulting in loss by fire. The charterer was held not liable on the ground that the subsequent negligence was so unlikely that it broke the causal chain. However, the court said:

> "A question might indeed arise, if he [the charterer] had seen what they were doing and had failed to intervene. We do not decide what duties his original act of negligence might in that case have imposed upon him; that which he originally could not have anticipated would then in fact have appeared about to take place. * * *" (at p. 97)

In view of the great hazard presented by Albina's welding operations and Albina's knowledge that an essential part of the fire protection system had been removed, it was foreseeable that the substitute supply might not be connected and that cargo would be extensively damaged throughout the hold if a fire should occur. Yet Albina commenced operations in the vicinity of dangerous cargo without fire fighting equipment and without making any investigation to determine if there was water pressure in the lines.[19] It unquestionably "caused" all of the loss.

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19. See also *Johnson et al v. Kosmos Portland Cement Co.*, 64 F2d 193 (CCA 3 1933), cert den 290 US 641-642 (1933); *Union Shipping & Trading Co., Ltd. v. US*, 127 F2d 771 (CCA 2 1942); *Interlake Iron Corp. v. Gartland SS Co.*, 121 F2d 267 at p. 270 (CCA 6 1941); Anno: 155 ALR 157, *Foreseeability as an element of negligence and proximate cause;* 2 Harper and James on Torts 1146, fn 42.

Reddick v. McAllister Lighterage Line, Inc., 258 F2d 297 (CA 2 1958), cert den 358 US 908 (1958), relied on by Albina, held only that the alleged improper stowage was causally unrelated to the accident. The court pointed out (at p. 301) that according to the evidence the improper stowage would not have resulted in any accident at all if the unloading stevedores had followed their customary and usual practice. There was neither notice nor knowledge of the defective condition, and the case has no bearing on the present facts.

e) As to third party cargo, principles of indemnity, contribution and division of damages are inapplicable, and Albina, having contributed substantially to the loss, must bear the entire loss. See, for example, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 US 282, 72 S Ct 277 (1952) in which an injured stevedore was allowed to recover all of his damages from a shipowner who was found by the jury to be only 25 per cent responsible.

3. Albina violated applicable ordinances and regulations which were binding upon it.

Albina (Br 51-63) expresses concern over the trial court's finding that its conduct violated § 16-2527

of the Police Code of the City of Portland[20] and 46 CFR § 142.02-20 of the Coast Guard Regulations[20], and that such violations constituted negligence causing or contributing to the fire (R 78-79, 90). In view of the evidence reviewed above establishing Albina's gross negligence and Albina's admission of negligence causing the fire (Br 62), the question is perhaps of little importance to cargo. As the trial court found,

> "There is abundant evidence of lack of due care in other particulars as specified by libelants against Albina * * *" (R 78)

Albina's position, in any case, is without merit.

The Portland Ordinance

Section 16-2527 of the Police Code of the City of Portland provides:

> "Section 16-2527. *Burning and Welding.* When any welding or burning is in progress, on any vessel, a suitable fire hose, with nozzle attached, shall be connected with a nearby fire hydrant and a test must be made, before any such welding or burning commences and occasionally while it is still in progress and said hose shall remain, ready for instant use, at least for one hour after any such welding or burning has been completed. A test must be made from time to time during the progress of any such operations. A competent attendant, equipped with not less than one, four pound, CO2 fire extinguisher,

20. It was stipulated that these regulations were "At all times * * * in full force and effect * * * " (R 55-56).

at hand and ready for instant use, shall be on hand and ready to act during each such welding or burning operation. If during any such operation, there will be a transmission of heat, through a bulkhead or above or below a deck where any such work is being done, a fire watch shall be maintained on both sides of the bulkhead or deck. Special attention shall be given where any such operations take place, near a refrigerator compartment or ventilator from any gaseous hold or compartment." (Libelants' Ex 4)

46 CFR § 146.01-12 provides:

"Nothing in the regulations in this sub-chapter shall be construed as preventing the enforcement of reasonable local regulations, now in effect or hereafter adopted, when such regulations are not inconsistent or in conflict with the provisions of the regulations in this part."[21]

Counsel concedes (Br 52) that some local regulations are valid under this provision. He claims, however (Br 54), that the Coast Guard regulation, which merely forbids welding near hazardous cargo and does not require (or mention) having a hose, the testing of such hose or the presence of an attendant equipped with a fire extinguisher, has pre-empted the field of prescribing safety measures to be taken when welding aboard vessels (Br 51-57).[22]

21. The statute has a similar provision (46 USCA § 170(7) (d)).

22. That regulation was, of course, also disregarded by Albina. This is in fact the regulation which Albina claims (Br 58-59) is not applicable to the case, because contractors are not listed among the groups of persons subject to it. Counsel also mentions other regulations which are claimed to conflict with the ordinance; they, however, are more remote than the one now considered and are controlled by the same principles.

The Coast Guard regulation provides:

"*Repairs or work involving welding or burning or other hazards.*

(a) A vessel having on board explosives or other dangerous articles as cargo shall not proceed to a ship repair plant or enter upon a drydock or marine railway or otherwise undertake repairs, or any work involving welding or burning, or the use of powder actuated tools or appliances which may produce intense heat, in violation of any of the following provisions:

(1) No such repairs or work, except emergency repairs to the vessel's main propelling or boiler plant or auxiliaries thereto, shall be undertaken while any explosives as cargo are on board.

(2) No such repairs or work shall be undertaken in holds containing any other dangerous articles as cargo, nor in compartments adjoining holds in which other dangerous articles as cargo are stowed except necessary repairs to the vessel's main propelling or boiler plant or auxiliaries thereto, including tail shaft and propeller.

(3) No such repairs or work shall be undertaken in or upon boundaries of holds, after the discharge of any cargo of explosives or inflammable solids or oxidizing materials, until all precautions are taken to see that no residue of cargo is left to create a hazard.

(4) No such repairs or work shall be undertaken in, or upon boundaries of, holds that have lately contained substances capable of giving off inflammable or explosive vapors, until such holds have been determined gas free.

(b) None of the provisions in paragraph (a) of this section shall apply to permitted articles of ships'

stores and supplies of a dangerous nature, although provisions shall be taken to afford safe storage and protection to such stores from any risk incident to the repair work.

(c) Contrary to the provisions set forth in this section, emergency repairs may be undertaken when in the judgment of the master, such repairs are necessary for the safety of the vessel, its passengers and crew." (46 CFR § 146.02-20; Libelants' Exh 3)

Counsel relies principally on *The City of Norfolk*, 266 Fed 641 (CCA 4 1920), cert den 253 US 491 (1920) in which a local harbor regulation prohibiting ships from anchoring in a channel was held invalid, because the federal law allowed such conduct. The regulation now considered, however, is silent with respect to the subject matter of the ordinance. It neither forbids nor permits welding operations conducted without safety precautions. It does not purport to regulate or prescribe precautions which must be taken and the fire fighting equipment which must be present when welding operations are performed in the holds of vessels.

Counsel does not contend that the ordinance is unreasonable; he does assert, however (Br 56-57) that this is a regulatory area in which maritime law must be uniform. This is demonstrably incorrect. Local repair operations are properly and conveniently controlled by local rules and policies, and contractors in each port can

know and abide by local regulations which reflect the individual needs of each port. Precautions which are necessary at one port might be an unnecessary burden on the commerce of another port. No uniform rule could possibly be fair or even effective. See Anno: *Necessity of uniformity of regulation as limitation on power of states to legislate as to interstate or foreign commerce in absence of congressional regulation*, 82 L Ed 14.

The substantial interest of the City of Portland in the application of this ordinance to Albina is apparent. A large amount of fire fighting equipment was summoned to fight the fire which resulted from Albina's failure to comply with the ordinance, and other parts of the city, normally protected by such equipment, were temporarily without fire protection. The fire, furthermore, presented a hazard to other port installations within the city. The trial court found that the fire would not have occurred if these, or other precautions, had been taken (R 90).[23]

The ordinance is unquestionably valid. In *Huron Portland Cement Co. v. City of Detroit*, 362 US 440, 80 S Ct 813 (1960) the Supreme Court held that the pro-

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23. Counsel asserts (Br 57) that the fire would have occurred even if the ordinance had been complied with. He contends throughout, however, that if water had been available within two minutes after the fire broke out, the resulting damage would have been negligible. Surely, if the ordinance had been complied with, substantially no damage at all would have resulted, justifying the court's general finding that "there would have been no fire" in such case (R 90).

visions of the smoke abatement code of the City of Detroit did not conflict with federal regulations directed to avoiding the perils of maritime navigation. It held that an intent to supersede the police power of the state

> "* * * 'is not to be implied unless the act of Congress fairly interpreted is in *actual conflict* with the law of the State' * * *" (at p. 443; emphasis supplied)

It said:

> "We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. * * *" (at p. 446)

In *Kelly v. Washington ex rel Foss,* 302 US 1, 58 S Ct 87 (1937) the Supreme Court sustained state legislation providing for the local inspection of vessels which were not subject to federal regulation for safety and seaworthiness. The Court said:

> "* * * The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal

action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two cannot 'be reconciled or consistently stand together' * * *" (at p. 10)

"In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the Federal laws and regulations have left untouched. There is plainly no inconsistency with the Federal provisions. * * *" (at p. 13)

The power and interest of the state was expressly affirmed:

"When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. * * *" (at p. 14)

The only limitation on the power of the state in such cases was that its action must not

"* * * pass beyond what is plainly essential to safety and seaworthiness, * * *" (at p. 15)

Finally, in *City of Seattle v. Lloyds' Plate Glass Insurance Co.*, 253 Fed 321 (CCA 9 1918) this Court sustained the power of the City of Seattle to designate proper places on its docks for the storage of nitroglycerin being transported in interstate commerce. It reviewed the federal legislation and regulations and said:

> "In all this we see nothing in any way relating to the place or places in any harbor of the United States where any kind of an explosive in course of foreign or intrastate commerce shall be placed, kept, or stored; * * *
>
> * * * 'there are many occasions where the police power of the state can be properly exercised to insure a faithful and top performance of duty within the limits of the state upon the part of those engaged in interstate commerce'. * * *"[24] (at p. 324)

The ordinance relates to a matter of public interest and importance to the local port which is not — and should not be — regulated by the Coast Guard regulation. It is valid and binding upon Albina.

Coast Guard Regulations

Albina's welding operation in the immediate vicinity of hazardous cargo was contrary to 46 CFR § 146.02-

24. See also *Buck v. State of California*, 343 US 99, 72 S Ct 502 (1952); *Eichholz v. Public Service Commission of Missouri*, 306 US 268, 59 S Ct 532 (1939); *Skiriotes v. Florida*, 313 US 69 at p. 75, 61 S Ct 924 (1941).

20.[25] Albina does not deny this, but contends only that the regulation does not apply to shoreside contractors who conduct welding operations in the holds of ships. It argues that it (Albina) is free to conduct welding operations near hazardous cargo, even though the ship is not.

However, 46 USCA § 170(7)(a) and (b) authorize regulations controlling the *use* of dangerous articles or substances on board vessels, and 46 CFR § 146.02-4(d) make § 146.02-20 binding upon "all persons engaged in the * * * *handling*" of dangerous articles or substances on board ships. Albina's *use* of dangerous articles and substances in the welding operation constituted a "handling" thereof which rendered the provisions of § 146.02-20 binding upon Albina.[26] As one handling dangerous articles or substances in the hold of the ship, Albina was bound by the regulation forbidding welding in the presence of hazardous cargo. Its conduct clearly violated the regulation.

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25. Quoted above, pp. 34-35.
Burlap is a hazardous cargo (46 CFR § 146.27).

26. *Shain et al v. Armour & Co.*, 50 F Supp 907 at p. 911 (DC WD Ky 1943); *Acme Breweries v. Brannan*, 109 F Supp 116 at p. 121 (DC ND Cal 1952); *Liberty Mutual Insurance Co. v. Hercules Powder Co.*, 126 F Supp 943 at pp. 946-947 (DC Del 1954); *International Harvester Co. v. National Surety Co.*, 44 F2d 746 at p. 750 (CCA 7 1930). Other regulations in the same chapter relating to inflammable liquids (§ 146.21-1(b)), inflammable solids and oxidizing materials (§ 146.22-1), compressed gases (§ 146.24-1 (c)), combustible liquids (§ 146.26-1) and other hazardous articles (§ 146.27-1) contain identical definitions of persons upon whom they are binding, except that the word "using" is substituted for the word "handling." We submit that the two words were regarded as substantially identical in meaning by those who wrote the regulations.

4. The trial court did not err in adopting its opinion as findings of fact and conclusions of law.

Albina, citing Admiralty Rule 46½, contends that the trial court acted improperly in adopting its opinion as findings and conclusions while also making additional findings and conclusions (R 87; Br 30-32). It does not, however, seek any relief from this alleged error, by reversal or otherwise (Br 32).

Albina is mistaken. The issues were simple, and the procedure followed by the trial court has repeatedly been approved in admiralty cases. See *Hanson v. Reiss SS Co.*, 1961 AMC 498 at p. 499 (DC Del 1960) and cases there cited.

CONCLUSION

There was abundant evidence that Albina's gross negligence caused the fire and the resulting damage to cargo. Whether or not Luckenbach should also have been held liable is not material to cargo's rights against Albina, which unquestionably must respond for the entire cargo loss.

In addition, Albina was guilty of a gross disregard for applicable regulations and ordinances designed to

prevent such fires and reduce damage from fires resulting from such operations.

Cargo's decree against Albina must be affirmed.

Respectfully submitted,

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